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October Term, 1943

No. 361

In the Supreme Court of the United States of America

FANNIE LONAS, PETITIONER

v.

NATIONAL LINEN SERVICE CORPORATION,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR NATIONAL LINEN SERVICE CORPORATION,
RESPONDENT

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INDEX

TABLE OF CONTENTS

TABLE OF CASES CITED

Cases:

CONGRESSIONAL ACTS, GOVERNMENT REPORTS, AND MISCELLANEOUS

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I.

OPINION OF THE COURT BELOW

The opinion of the Court, from which this appeal is being taken, is published in 136 F. (2) 433 and appears at page 37 of the Record.

II.

STATEMENT OF FACTS

This is a petition for a writ of certiorari from a decree of the United States Circuit Court of Appeals for the Sixth Circuit affirming the decree of the United States District Court for the Eastern District of Tennessee, which decree dismissed, on respondent's motion, a complaint to recover unpaid minimum wages, overtime compensation, damages, attorney's fees, and costs.

The complaint was filed by petitioner on behalf of herself, two named employees, and a number of un-

named employees "similarly situated" under Section 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C.A. Sections 206 and 207.

In her complaint, as amended, (R. 1-5 and R. 6-8) petitioner alleged:

That the respondent corporation maintains its main office in Atlanta, Georgia, where it manufactures or buys linens (such as towels, nurses' uniforms, bus seat covers, pillow cases, hospital linens, etc.), cabinets, and toilet articles (such as brushes and soaps), (R. 1, 2, 7, 8) and sends same out to various Branch Offices, where it engages through those Branches in renting the use of its linen supplies to customers; that respondent's local Branch at Knoxville, Tennessee, where petitioner was employed, launders the linens, and rents the use of these clean linens and other toilet supplies to customers, 20% of which are located in the States of Kentucky and Virginia, and 80% in the State of Tennessee (R. 2, 7); that 60% of such customers are commercial or industrial firms; 5% are interstate carriers, and 35% are private families and individuals (R. 8); that her work consisted of "the shaking of wrinkles out of starched products for the operator of the mangle and ironing machine, operating the mangle, folding the products coming from the mangle, packing, wrapping, and tying the products in bundles for delivery" (R. 7, 8); that she worked from one to two hours per day on goods which were shipped out of the State (R. 7-8), and that her total work-week was approximately sixty hours per week for which she received $8.00 per week from October 24, 1938, to October 6, 1939, and $9.00 thereafter (R. 7, 8).

To the amended complaint respondent filed its Motions to Dismiss, to Strike and for a Bill of Particulars (R. 10-17) upon the following grounds:

(1) That the complaint shows on its face that the Knoxville, Tennessee, Branch of respondent known as "Southern Linen Service" is:

(a) a service establishment, (R. 11),

(b) a retail establishment, (R. 10),

the greater part of whose business is in intrastate commerce, and, therefore, all of the employees of said Branch are exempt from the Wage and Hour provisions of the Fair Labor Standards Act under Section 13(a) (2) thereof (Title 29 USCA, § 213(a) (2). [1]

(2) That the complaint shows on its face that petitioner and the employees on whose behalf she sued were not engaged in interstate commerce, or in the production of goods for commerce, within the meaning of the Fair Labor Standards Act. (R. 12).

(3) That petitioner cannot sue on behalf of unnamed employees and employees out of the jurisdiction of the court in which the complaint was filed. (R. 11).

(4) That the complaint did not set out the authority under which petitioner filed this suit in behalf of the two named employees. (R. 11).

(5) That the allegations as to the overtime worked or the amount due to petitioner were too vague and indefinite for respondent to join issue. (R. 16).

The Motion to Dismiss was sustained by the trial judge on July 11, 1942, (R. 20) upon the ground that

[1] Section 13(a) (2) of the Fair Labor Standards Act:

The provisions of Sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce.

respondent is a service establishment, the greater part of whose servicing is in intrastate commerce, and, therefore, exempt under Section 13(a) (2) of the Act. (R. 18-19).

From this decree petitioner appealed to the United States Circuit Court of Appeals for the Sixth Circuit. That Court on June 22, 1943, by unanimous decision, affirmed the decree of the lower court in an opinion written by Simons, C. J., holding that respondent is a service establishment; that all service establishments, regardless of whether their customers are individuals or industrial and business firms, are exempt under Section (13) (2) of the Fair Labor Standards Act; and that said Section of the Act is clear and unambiguous in its meaning and does not need "resort to extrinsic aids to construction."

III.

PETITIONER'S GROUNDS FOR CERTIORARI

The petition for a writ of certiorari filed to this Court by petitioner, gives as the reasons relied upon for the allowance of the writ that:

(1) There is a conflict between the decision of the United States Circuit Court of Appeals for the Sixth Circuit in the case at bar and the United States Circuit Court of Appeals for the Fourth Circuit as to whether a suit brought under the Fair Labor Standards Act should be dismissed upon motion alleging a failure to state a cause of action, before introduction of evidence. (Petition for Writ, page 7).

(2) The United States Circuit Court of Appeals for the Sixth Circuit has construed a Federal Statute, which has not been, but should be, construed by this

Court because of the many employers and employees which it affects. (Petition for Writ, page 8).

(3) The United States Circuit Court of Appeals for the Sixth Circuit and the Administrator, personally, do not differentiate between the activities of a linen service company and that of a laundry. (Pet. for Writ, page 9).

(4) The term "service" is not defined in the Act. (Pet. for Writ, page 9).

(5) The decision of the United States Circuit Court of Appeals for the Sixth Circuit in the case at bar "is probably in conflict with the decision of this Court in the case of *Walling v. Kirschbaum.*" (Petition for Writ, page 9).

(6) There is a conflict between the United States Courts of Appeals for the Fourth and Sixth Circuits in the definition of the term "service," the Fourth Circuit holding that the term "service" is modified by the word "retail" and does not apply where labor is performed on the employer's goods (Supplement to the Petition for Writ, page 1).

IV.

ARGUMENT

(A)—DISCUSSION OF GROUNDS OF PETITIONER FOR ALLOWANCE OF WRIT.

(1) Respondent respectfully submits that there is no conflict in the decision by the United States Circuit Court of Appeals for the Sixth Circuit in dismissing the petition in the case at bar with the decisions of the Fourth, or any other Circuit. Nowhere in the Fair Labor Standards Act does it appear, and no court has

held, that a suit brought under that Act is relieved from the fundamental requirement of all pleadings that a complaint must set out a cause of action.

Petitioner's complaint shows that respondent is a service establishment, the greater part of whose servicing is in intrastate commerce, and since Section 13(a) (2) of the Act clearly exempts all employees of such establishments, there would be no necessity to introduce proof since "it must be assumed that proof would not expand the allegations of the amended complaint, and further amendment was not requested even in the face of the motion to dismiss." (Opinion of Simons, C. J., in *Lonas v. National Linen Service Corporation, supra*). Nothing in the cases cited by petitioner conflicts with this position of the Court.

In the case of *Burton v. Zimmerman*, 131 F. (2) 377, the action was brought by maintenance employees of an office building, alleging that the tenants of the building were engaged in interstate commerce. The court held:

> Under the allegations that the tenants of the building were engaged in interstate commerce, the plaintiffs, as porters and laborers within the building, may prove that they were rendering services necessary to the activities of the tenants, and thus be within the coverage of the Act.

It is now well established upon the authority of *Kirschbaum v. Walling*, 316 U. S. 517, that the renting of office space is not a service exempt under Section 13(a) (2) of the Fair Labor Standards Act, and, hence, where a building is occupied by tenants in commerce or producing goods for interstate commerce, the activities of the maintenance employees may be so closely related to those of the tenants as to bring such employees with-

in the coverage of the Act. This is a matter of proof in each particular case.

In *Musteen v. Johnson*, 13 F. (2) 106, two employees, in an action for overtime compensation under the Act, alleged that the employer was a wholesale petroleum dealer and distributor in interstate commerce, and that the petitioners were truck drivers, one driving across state lines and the other within the state.

The court held:

> The complaint will not be dismissed for insufficiency of statement on the grounds that the employees were engaged as private carriers in interstate commerce, that their hours were subject to regulation by the I.C.C., and that, therefore, they were exempt from the maximum hours provisions of Section 13(b) of the Act, since the question of the existence and validity of the claims asserted are questions of fact to be determined from evidence and not from the face of the plaintiff's pleadings.

The Court specifically stated:

> There is no justification for dismissing a complaint for insufficiency of statements except when it appears to a certainty that the plaintiffs would be entitled to no relief under any state of facts which could be proved in support of the claim asserted by him. (Underscoring ours).

To the same effect is the decision in *Stratton v. Farmers Produce Company*, 134 F. (2) 825:

> A complaint ought not to be dismissed for informality or insufficiency of statement unless it appears to a certainty that under any state of facts which may be proved in support of the asserted

claim, no basic right of action can possibly exist or no relief can possibly be granted. (Underscoring ours).

That precisely is the basis of the judgments rendered by the courts below in the case at bar.

The amended petition in the case at bar fully describes the duties of petitioner and the business of respondent, and from the facts set out it appears that respondent is a service establishment within the meaning of Section 13(a) (2) of the Fair Labor Standards Act, and all of its employees are exempt from the provisions of Sections 6 and 7 thereof. It was evidently the unanimous opinion of the Judges of the United States Circuit Courts of Appeals and the opinion of the Judge of the District Court that in this case "under any state of facts which may be proved in support of the asserted claim, no basic right of action can possibly exist and no relief can possibly be granted."

Rule 12 Sub-section (b) (6) of the ~~United States Supreme Court rules~~ provides that: "Failure to state a claim upon which relief may be granted, ~~(~~may~~)~~ at the option of the pleader ~~by made~~ by motion."

We respectfully submit that this Rule has not been abrogated or modified by the Wage and Hour Law or by any of the decisions referred to in petitioner's brief.

(2) That the Supreme Court of the United States has the right to construe Federal Statutes is, of course, not questioned by anyone, but inherent in that right is the common sense reservation that it will be exercised only where there is an ambiguity or uncertainty in the language of the statute. The right to construe is the right to clarify, but where no clarification is necessary this Court will not exercise its prerogative merely because a statute may be of great public interest

or of social and economic significance. This reservation goes to the very basis of the constitutional provisions for the judicial and legislative branches of our government. Our courts interpret only where interpretation is necessary. In this case, however, to cite Simons C. J., "the exemption section being without ambiguity, we find no occasion to resort to extrinsic aids to construction, though it may be said in passing that even though we were to consider the legislative history of the section as reviewed by each of the litigants, it would be far from clear that Congress intended anything other than what it clearly expressed."

The fact that Section 13(a) (2) affects a great many individuals would not in and of itself induce this Court to exercise jurisdiction in this case. All Acts passed by Congress, being national in their scope, necessarily affect a great many individuals. It is the need for clarification of an Act of the Congress that is the test as to whether or not jurisdiction will be taken by this Court, not the extent of the coverage of such Act.

(3)-(4) The contention of petitioner, that the Circuit Court of Appeals, Sixth Circuit, did not properly differentiate between the activities of respondent, a linen supply company, (which she contends is not a service establishment) and a laundry (which she concedes to be a service establishment) will be dealt with subsquently in this brief. We stress at this point that throughout the proceedings petitioner relies upon Interpretative Bulletin No. 6 (attached to the petition for writ of certiorari) which admits that a linen supply company is a service establishment, but distinguishes between a linen supply company servicing industrial users and one serving private families, holding that while they are all service establishments, the former is not entitled to the exemption of Section 13(a)

(2) while the latter is entitled to that exemption. (*Interpretative Bulletin No. 6, paragraph 25*).

Laundries and linen service companies are, as a matter of fact, normally recognized as businesses identical in nature and economic function, and have been recognized as service establishments by the 1939 Census,[2] the Emergency Price Control Act,[3] the Walsh-Healy

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[2] In a volume issued by the United States Department of Commerce, Bureau of the Census, entitled 16th CENSUS OF THE UNITED STATES, 1940, CENSUS OF BUSINESS SERVICE ESTABLISHMENTS 1939, appear the following statements and classifications:

On Page 1: "Scope of Census—The service phase of the Business Census covers establishments engaged in a variety of kinds of business whose primary activity is in the sale of service, as distinguished from establishments dealing in merchandise, which are covered by the censuses of retail and wholesale trade."

On Page 3: "Establishments—Only recognizable places of business are considered establishments. A place of business to be qualified as a service establishment must have been primarily engaged in providing service—that is, fifty per cent or more of the revenue of the establishment must have been derived from the sale of service. If more than fifty per cent of the total operating revenue of the establishment represented receipts from the sale of merchandise, such establishment was included in either the Census of Retail or Wholesale Trade. Each unit of a chain is considered a separate establishment."

On Page 4: Table 1 A—Establishments, Receipts, Personnel and Payroll by kinds of business.

Laundries, hand .....
Laundries, power, total .....
Doing linen supply service only .....
Doing fifty per cent or more linen supply service .....
Doing less than fifty per cent linen supply service .....
Doing no linen supply service .....
Linen Supply Service without laundry facilities .....

[3] Under the Emergency Price Control the term "commodity" includes all services rendered other than as an employee. This

Act,[4] and under the N.R.A.[5] In a War Manpower

provision is contained in Section 302(c) of the Act, which provides as follows:

> The term commodities * * * also includes services rendered otherwise than as an employee * * * in connection with the operation of any service establishment for the servicing of a commodity.

The meaning of the phrase "service establishment" is to be found in the Committee Report rendered by the House of Representatives, (CCH War Law Service, ¶41,084, page 41,062), which reads as follows:

> The term "service establishment" is intended to include all establishments rendering service in connection with the use of goods, including such typical establishments as laundries, cleaners and dyers, and other such establishments listed as service establishments by United States Census. (Underscoring ours).

Since as shown above, the United States Census classes linen supply business as a service establishment, it is clear that the Price Control Act likewise classed that business as a service establishment.

[4] Under the Walsh-Healy Act, service contracts are exempted from the operation of the Act.

> Laundry and dry cleaning contracts * * * have been held purely personal service contracts, and hence outside the scope of the Act. (I. R. A. Page 2849, ¶B-2513) (Rulings and Interpretations No. 2, Page 13).

[5] In a booklet entitled "INDUSTRY AND BUSINESS CLASSIFICATIONS" issued in 1933 by the N. R. A., Division of Economic Research and Planning, prepared by Stanley Irving Posner, senior statistician, in cooperation with the Bureau of the Census, the Bureau of Labor Statistics (which is a branch of the Labor Department), and the Central Statistical Board, the following classification is listed on Page 9:

DIVISION P.—SERVICE

Section I. Domestic Service

040 Laundries. Steaming, dry cleaning, dyeing (not textile dyeing, see 801); coat or towel service (all types, hand laundry), power laundry, etc. (Not including tailor shops where cleaning and dyeing is done. See 043.)

Commission Order issued on or about October 2, 1943, listing locally needed activities, laundries, dry cleaning establishments, and linen supply companies are all classified and listed as "service establishments."

Laundries frequently engage in renting linen service to their customers. The primary function of a linen service company is not, as contended by petitioner, the selling or renting of articles, but the rendering of a service. The customer of a linen service company does not rent any particular towel for a definite length of time. What the customer contracts for, and what the respondent in this case sells, is the *service* of maintaining at all times clean linens for the use of its customers, and the respondent supplies everything that may be necessary in order for that service to be effective, be it a towel, soap, cabinet, or any other similar accessory.

The contract between respondent and its customers is neither a contract of sale nor of rental. The essence of a sale is that title to a particular property passes from vendor to vendee. The essence of a rental contract is that the rentee obtains for a definite and, normally a substantial, length of time, the use of a particular property. Neither of these conditions present themselves as the primary object of the agreement between respondent and its customers. It is the *maintenance of a service* which respondent offers for sale in the same manner that a laundry offers its services for sale. The fact that respondent is the owner of the linens is but an economic convenience incidental to the transaction.

(5) That the decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar is not in conflict with the holdings in *Kirschbaum v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Company v. Hall*, 87 L.Ed. 99; *Overstreet v. North Shore Corpo-*

ration, 87 L.Ed. 423; *McLeod v. Threlkeld*, 87 L.Ed. 1154; *Walling v. Jacksonville Paper Company*, 87 L.Ed. 393, appears upon an analysis of these cases.

The coverage of an employee by the Fair Labor Standards Act depends upon whether that employee is "engaged in interstate commerce" or "in the production of goods for commerce." It is now settled law that there is a difference between the application of the Act to employees who have any connection with the production of goods for commerce, and its application to employees who are merely engaged in commerce. In the former case, whenever the activity of the employee is such that he may be considered aiding in the production of goods for commerce, he is considered covered by the Act; while in the latter case it is not sufficient that the employee's activities affect or indirectly relate to interstate commerce. They must be actually so closely related to the movement of commerce as to be a part of it. (*McLeod v. Threlkeld, supra*). Keeping this distinction in mind, an analysis of the above cited cases makes it clear that the decisions rendered therein follow a clearly marked line of judicial determination.

In *Kirschbaum v. Walling, supra* (and the *Arsenal Building Company* case), the Court held that where the activities of maintenance employees in a building occupied primarily by tenants engaged in the production of goods for commerce are so necessary to the process of production that the goods could not be produced without their services, such employees are covered by the Act as "producing goods for commerce." Quite clearly, as stated by Judge Taylor in the United States District Court for the Eastern District of Tennessee in the case at bar, nothing in the *Arsenal and Kirschbaum cases, supra*, has any application to this case.

In *Warren-Bradshaw Drilling Company v. Hall, supra,* the Court held that an employee engaged in the drilling of an oil well to a specific depth short of oil, but whose activity is an essential preliminary to the subsequent production of the oil, is himself engaged in the production of goods for commerce.

Neither of the holdings in the above two cases is in possible conflict with the decisions of the Circuit Court of Appeals and the District Court in this case, since, as will subsequently be shown in this brief, the petitioner is not engaged in the production of goods for commerce, for their work is merely laundering linens *already produced* and previously used.

In *Walling v. Jacksonville Paper Company, supra,* this Court dealt with employees engaged in interstate commerce and defined the extent to which an employee must be related to the flow of such commerce in order to be covered by the Act. It was held that where a wholesaler imports merchandise from without the state, some of it continuing in interstate commerce and some of it coming to rest, only those employees actually engaged in the movement of the merchandise in interstate commerce or who assist and contribute to the flow of that merchandise in the channels of interstate commerce are covered by the Act; the coverage of the Act did not extend to persons whose activities merely affected commerce.

In *Overstreet v. North Shore Corporation, supra,* this Court held that persons employed in operating draw bridges, collecting tolls, repairing and maintaining a toll road over which persons and goods pass in interstate commerce, are so intimately connected with the movement of goods and persons in interstate commerce and perform functions so essential to such movement, that they are engaged in commerce within the meaning of the Fair Labor Standards Act.

In *McLeod v. Threlkeld, supra,* this Court reiterated once again its position that only those employees who are actually engaged in work essential to the flow of interstate commerce are "engaged in commerce" within the meaning of the Fair Labor Standards Act. The court held that a cook employed by a contractor to prepare and serve meals to maintenance-of-way employees of an interstate railroad is not engaged in commerce.

It is patent from the last three cases cited that the petitioning employees are not engaged in interstate commerce within the meaning and coverage of the Fair Labor Standards Act. If the feeding of railroad maintenance employees is not an occupation so essential to interstate commerce as to bring the cook within the coverage of the Act, surely the operation of a mangle, the shaking of wrinkles out of starched linens, and similar activities of an employee in a laundry plant of a linen service company, is not an occupation so essential to interstate commence as to bring the employee within the coverage of the Act.

(6) In the supplement to the petition for a writ of certiorari the petitioner contends that in *Guess v. Montague* (U.S. Circuit Court of Appeals for the Fourth Circuit, No. 5089, decided Sept. 16, 1943) the court differs with the decision in the case at bar in holding that the word "retail" in Section 13(a)(2) modifies the term "service" (so that only "retail service" establishments are exempt), and that the fact that the work performed in an establishment is on goods belonging to the employer makes a difference in determining the type of the establishment and its exemptibility under the aforesaid Section of the Act. In support of the latter proposition a number of cases are cited in the brief of the petitioner.

We shall first discuss the holdings in *Guess v. Mon-*

tague; next, whether the coverage of the respondent's business by Section 13(a) (2) is affected by the fact that it owns the linens on which petitioner works; we shall then discuss the meaning of the terms "retail" and "service" in the said Section. Finally we shall show that the business of the respondent's Knoxville branch, the "establishment" under consideration, is a local retail business.

(a) DISCUSSION OF GUESS et al vs. MONTAGUE

In *Guess et al v. Montague*, supra, the court held that a machine shop engaged substantially in the sale in interstate commerce of scrap iron and in the rebuilding of machinery which were sold to manufacturing concerns engaged in interstate commerce, was not a service establishment. In its opinion the Court stated:

> It is clear, we think, that the business of the defendant cannot be brought within the exemption of Section 13(a) (2). While the repair of machinery for customers, if there were nothing more, might fall within the exemption, the very substantial business of conditioning and selling scrap would certainly not come with in. * * * Nor would the work done in rebuilding and reconditioning second-hand machinery for sale by defendant fall within the exemption, which does not extend to manufacturing or processing goods for sale. (Underscoring ours).

Obviously there is nothing in common between a machine shop building and reconditioning machinery and selling scrap in interstate commerce, and a linen supply service. The holding of the court that the former is not a service establishment can have no application to the holding that the latter is such an estab-

lishment. There is thus no conflict between the decision in *Guess v. Montague* and in the case at bar.

It is true that in the opinion of the case there is dicta to the effect that a service establishment contemplated in Section 13(a) (2) must be one selling to consumers. We respectfully submit that the conflict between dicta in a case decided by one Circuit and a decision rendered in another Circuit is not such a "*conflict in decisions*" between various Circuits which would warrant the exercise of this Court's discretion in granting a writ of certiorari. Moreover, since, as will hereinafter be shown, respondent is a service establishment selling its services to consumers, there is no conflict between the dicta in *Guess v. Montague, supra*, and the decision in case at bar.

(b) RESPONDENT A SERVICE ESTABLISHMENT REGARDLESS OF ITS OWNERSHIP OF LINENS.

Throughout the proceedings the respondent's position has been that it is a service establishment. Neither the petitioner nor the Administrator, who appeared as amicus curiæ in the Circuit Court, seriously challenged this position. They merely contended that in accordance with the provisions of Interpretative Bulletin No. 6, it is not exempt because it serves industrial and commercial firms and hence is not a "retail" service establishment. In her supplemental petition and brief, however, the petitioner contends that because the respondent owns the linens and certain other accessories furnished to its customers, it is not a service establishment.

A service establishment, as previously stated, is an establishment whose primary function is the rendering or selling of services. It is immaterial whether that service is rendered through the medium of its own

goods and accessories or through the medium of goods and accessories of the customer. Interpretative Bulletin No. 6 (Par. 24) cites as typical examples of service establishments hotels, tourist houses, trailer camps, drive-it-yourself establishments, dress suit rental establishments, etc. In each of these cases the service is rendered by the establishment through the medium of its own goods or property. The customer of respondent purchases the clean linen service, and the nature of the contract with respondent would remain the same if the customer owned the linen and contracted for respondent to pick it up at regular intervals, launder it, and return it for use in the same manner in which respondent now operates with its own linens. To limit the meaning of the words "service establishment" to only those establishments which render service directly upon the persons or property of other people would be to give that term a legalistic and unreal meaning, when, as a matter of fact, by well established rules of judicial construction, it should be given the normal and broader meaning in which it is used.

"Linen service companies and laundries have long been regarded and classified as local service enterprises by Federal Departments and Agencies as well as by trade associations and the public." (*Lonas v. National Linen Service Corpn.*, 136 Fed. (2) 433). None of the cases cited in the brief bear out petitioner's contentions.

In *Kirschbaum v. Walling, supra*, the Court held that the renting of space in a loft building is not a service establishment. But for reasons pointed out above, the rental of the use of a particular piece of real property is in no way comparable to the business of respondent, and is no authority for the position of petitioner.

Walling v. Casale, 6 Labor Cases (CCH) Page 64,-469, merely holds that where an establishment furnishes trucks for the movement of merchandise of customers engaged in interstate commerce, the mechanics, greasers and similar truck attendants whose activities make possible the flow of the goods in the channels of interstate commerce, are themselves engaged in the transportation of goods in interstate commerce and are covered by the Act. The decision in that case was not based on the theory that the defendant was not a service establishment *because it owned the trucks* on which its employees worked.

In *Walling v. Peoples Packing Company*, 132 F. (2) 236, the Court held that "the slaughtering department of a packing house is not a service establishment * * * but performs a 'processing operation'." This is clearly true since the principle function of the packing house was the sale of the meat products and by-products which it was producing. It was a processor within the meaning of the Fair Labor Standards Act, and by no stretch of the imagination a service establishment.

In *Hanson v. Largerstrom*, 133 F. (2) 120, the Court held that: "Where an employer operating a logging camp to cut pulp wood for conversion into wood products for shipment in interstate commerce, maintained a cookhouse, which sold meals to employees and to the public, but which gave negligible service to the public," the cookhouse was a necessary part of the company's production of goods for commerce, and the cookee was subject to the coverage of the Wage and Hour Act as one engaged in the production of goods for interstate commerce.

(c) SECTION 13(a) (2) EXEMPTS RETAIL AND WHOLESALE SERVICE ESTABLISHMENTS.

(1) KNOXVILLE BRANCH OF THE RESPONDENT IS A SEPARATE ESTABLISHMENT.

In her complaint (R. 1-3) petitioner refers to the business activities and organization of the National Linen Service Corporation and its various branch offices. But the complaint also states that the petitioner works at the Knoxville branch of the respondent operated under the trade name of "Southern Linen Service."

The term "establishment" as used in the Act is defined by the Administrator in Interpretative Bulletin No. 6, paragraphs 33 and 34, as follows:

> A physical place of business—not synonomous with the word "business" or "enterprise" as applied to multi-unit companies. Thus for example: a manufacturing company which has its own retail outlets, operates a number of separate and different types of establishments. Each physically operated place of business must be considered as a separate establishment.

This is in accord with the ruling in *Fleming v. American Stores*, 42 Fed. Supp. 511; affirmed 133 Fed. (2nd) 840, where the court holds:

> Each unit of defendant's enterprise constitutes a separate establishment within the meaning of Section 13(a) (2).

The business activities of the Knoxville branch are, therefore, the only ones in issue before the Court. From the allegations in the petition it appears that these activities consist of the furnishing a clean linen service to customers 80% of whom are in the state and the

balance in the adjacent states of Virginia and Kentucky. In connection with its business of furnishing linen service, it operates a laundry where the petitioner is engaged. That this type of an establishment is a service establishment is obvious from the preceding discussion of the nature of the business of the respondent as well as from a consideration of the fact that it has at all times been considered as such by the public, governmental agencies and in Congressional enactments. (See footnotes 2, 3, 4, & 5, Supra).

The plaintiff alleges, however, that 60% of the respondent's customers are industrial or commercial firms, and 5% are interstate carriers (the rest are private families) (R. 8) and contends that the exemption of Section 13(a) (2) applies only to retail service establishments and since the respondent serves industrial firms and interstate carriers it is not a retail service establishment.

That the respondent is embraced in the exemption of Section 13(a) (2) and that said Section of the Act applies to *all service establishments*, regardless of the type of customer, can be demonstrated by a consideration of the history of the legislation, a proper interpretation of the Section and its judicial construction.

(2) LEGISLATIVE HISTORY OF THE FAIR LABOR STANDARDS ACT

The history of the Act discloses that in adding to the exemption of Section 13(a) (2) the words "or service" and "the greater part of whose servicing," Congress intended to include that group of business activities within which the Knoxville Branch of respondent clearly falls.

The original bill introduced in the Senate (No. 2475) contained no exemption for employees of either retail

or service establishments, but under that Act a Board was to determine which businesses affecting commerce were to be subject to the Act. The Senate chose, however, to determine its own exemptions from the operation of the law, and in the bill it passed the term "employee" was defined to exclude "any person engaged in a bona fide executive, administrative, professional, or local retailing capacity." A Board was to define and delimit these terms. When this bill was reported to the House by the Committee on Labor it was proposed that the above exemption be extended to include outside salesmen. This bill as recommitted by the House to the Committee on Labor contained this added exemption and provided that the terms were to be defined by the regulations of the Administrator. Upon its final passage by the House, the bill contained the same exemptions but provided that the terms were to be defined by the regulations of the Secretary of Labor.

When the Senate and House could not agree upon the bill, it was sent to a Conference Committee. An exemption substantially in its present form appears in the confidential Conference Committee prints (June 10, 11, and 12, 1938, respectively), which exempted "any employee engaged in a retail establishment, the greater part of whose selling is in intrastate commerce." In the final conference report (Report No. 2738, June 11, 1938) the words "or service" and "or servicing" were added. The report states (ibid page 32) "it includes an exemption from both wage and hour provisions for employees of retail and service establishments, the greater part of whose business is in intrastate commerce."

It thus appears that the legislation at all times contained a blanket exemption of persons employed as retail salesmen or in a retailing capacity, and it was

only in the final stages of the legislation that the exemption was extended to include employees of service establishments. Since retail establishments were included in earlier drafts of the Bill and the employees of retail service establishments were thus already exempted, it becomes evident that Congress intended to include employees engaged in *all* service establishments when they added to Section 13(a) (2), the exemption of "service establishments," "the greater part of whose servicing is in intrastate commerce."

The history of the legislation further shows that Congress viewed "retail and service establishments, the greater part of whose selling was in intrastate commerce" as purely local business enterprises, and the problem of regulating the wages and hours for employees of such enterprises was left to be dealt with by the several states.

> In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States. *Walling v. Jacksonville Paper Company*, 87 L.Ed. 393.

Congress recognized that there may be instances where service or retail establishments may cross state lines, but the enactment by Congress expressly exempted from the provisions of the Act those retail or service establishments, the greater part of whose servicing or selling was in intrastate commerce.

The debate preceding the enactment of the Bill, as recorded in the Congressional Record, abounds in statements clearly evidencing these facts. [6]

[6] The following excerpts are from the Congressional Record and Committee Reports:

Senator (now Mr. Justice) Black reported for his Committee:

In testifying at joint hearings before the Committee on Education and Labor, U. S. Senate, and the Committee on Labor, House of Representatives, Leon Henderson also indicated that it was not the intent of the Bill to have any application to employees engaged in what he called "distribution and service" in which cate-

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The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden and harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce. For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to lie near State lines and solely on account of such locations, actually serve a wholly local community trade within two states.

(Report No. 884, Senate Committee on Education and Labor, to accompany S. No 2475, page 5).

On the floor of the Senate, Senator Black stated:

The bill * * * is limited except to the small extent I have heretofore indicated, to goods which are actually manufactured for transportation and are transported in interstate commerce. We, therefore, eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various service employments throughout the Nation.

This is done for two reasons. In the first place, the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, if not the unanimous sentiment of the committee, that business of a purely local type which serves a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the States in which the business units operate.

(July 26, 1937, Congressional Record, Page 9823, 75th Congress).

gory he stated that thirteen and one-half million people were employed. [7] Surely that figure is much too high for the number of employees in the service establishments which the Administrator holds are covered by the exemptions under the Act, to-wit: "retail service establishments."

(3)—INTERPRETATION OF SECTION 13(a) (2)

By standard and well accepted rules of judicial interpretation meaning must be given to the words used by the legislative body in the enactment, and when the language used is as clear and unambigious as it is in this Act, it cannot be interpreted away. This was the

[7] Testimony by Leon Henderson before Committe on Education and Labor U. S. Senate, and the Committee on Labor, House of Representatives, 75th Congress, First Session, on S. 2475 and H. R. 7200:

I have made an estimate of the labor force in the United States, employment, and preliminary estimate of coverage of the Black-Connery Bill:

Figures recently released by the Bureau of Labor Statistics show 34,100,000 employed in March, 1937, in non-agricultural pursuits:

* * * *

The total employment of 34,100,000 is made up as follows:

Industry	14,700,000
Distribution and Service	13,500,000
State, Local, Federal	1,700,000
Proprietors and self-employed	4,200,000
Total	34,100,000

I guess that the Black-Connery Bill because of Constitutional and other limitations, would include:

Distribution and Service	13,500,000
State, Local, Federal Employees	1,700,000
Proprietors and self-employed	4,200,444
Total	19,400,000

reasoning of the judges in the Circuit Court as well as the District Court.

Had Congress, by adding the words "or service" and "or servicing," merely intended to clarify that retail service establishments are to receive the benefits of the exemption it could have done so much more simply by defining a "retail establishment" as one that sells not only goods and merchandise, but services as well. This is precisely what Congress did in defining the term "commodities" in the Emergency Price Control Act (Supra).

We submit that it is more logical to assume that in its definite policy to exclude certain phases of business activities from the operations of the Fair Labor Standards Act, Congress carefully considered to whom the exemptions are to apply and who was to define the terms used in the exempting clause. And Congress finally concluded that it desired to exempt not only persons engaged in all retail establishments, but those engaged in all service establishments as well, provided the greater portion of the selling or servicing of the establishment was in intrastate commerce.

It is significant that it excluded from Section 13(a) (2) the provisions that the terms used in that section are to be defined by the Administrator, as is provided in Section 13(a) (1), clearly indicating that Congress desired no administrative interpretation to limit the scope of the exemption.

Bulletin No. 6 concedes that the linen service business is a service establishment, (supra) but contends that so long as a service establishment partakes of the nature of a retail business in furnishing its services to individuals, it is exempted under Section 13(a) (2), but as soon as it begins to furnish its services to commercial or industrial organizations, while it still re-

mains a service establishment "it may not be considered a service establishment for the purpose of the exemption," for it then becomes a wholesale service establishment, and, as such, is not exempt under Section 13(a) (2).

Inherent in this reasoning is the dual assumption that the word "retail" modifies the phrase "service establishment"; and the further assumption that when a linen service company rents its clean linens and towels to the doctor or lawyer (considered by the Administrator as a consumer) for use in his office, it is a retail establishment; but when it rents these linens and towels to the butcher or baker, or anyone engaged in mercantile business (who is not considered a consumer) for use in stores or restrooms, the linen service establishment then becomes a wholesale establishment, and, therefore, conclusively presumed to be within the coverage of the Act.

In interpreting Section 13(a) (2) and restricting its application the Administrator (in Bulletin No. 6 paragraph 22, 30-32) and the petitioner (in her brief pp 9-16) advance the following reasons:

(1) The legislative history of the Act:

(2) That the words "retail" and "service" are coupled in the same sentence used in the disjunctive modifying the same word "establishment," and hence must both apply to those establishments which deal directly with the consumer;

(3) That to hold otherwise would ascribe a breadth to the term "service establishment" so wide and undefined that it would render meaningless other provisions of the Act;

(4) That if the term "service establishment" in-

cludes all establishments rendering service, the more specific exemptions in Section 13(a) would be superfluous;

(5) That all wholesale business is within the coverage of the Act.

We challenge the correctness of this reasoning.

(1) Our discussion of the legislative history of the Act shows that Congress intended to exempt the employees of all service establishments from the Act's coverage.

(2) There is no principle of logic or statutory construction which holds that words having an entirely different meaning are to be put in opposition merely because used in the same sentence and modified by the same adjectival qualifying phrase. We might cite numerous statutes where unique results would occur, and such construction could only pervert the plain meaning of the legislature. For example: The Securities and Exchange Act of 1933, Title 15, Paragraph 77(c) subparagraph (4) exempts "any security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, etc." Certainly, no one would contend that the word "religious" modifies every other adjective in this paragraph and all are modified by the qualification "that a person must be organized not for pecuniary profit." The contention would hardly be considered that a charitable organization not connected with any religion or religious organization should be excluded from this subparagraph.

(3) The third line of reasoning utilizes the strategy of disproving a theorem by the suggestion of a doubtful and extreme case. We recognize that in every trans-

action there enters an element of service, and hence every industrial or commercial enterprise renders a "service." From this it does not follow that we must narrow the term "service establishment" as used by Congress in this Act to the concept of "retail service establishment," or else broaden it so as to include every conceivable business transaction. There is a well defined group of commercial and industrial activities which governmental departments' classifications and acts of Congress have recognized and designated as "service establishments." It is this particular group of activities which Congress intended to exempt. It is submitted that extremes are not favored in statutory construction where reasonableness of meaning is the guide.

Whatever terminology is used, the criterion is necessarily one of degree and must be so defined.

> * * * And what is reasonably clear in the particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases. *Santa Cruz Fruit Packing Company v. N. L. R. B.* 303 U. S. 453.

(4) The business activities, the employees of which are exempted under Section 13(a) (3) through 13(a) (11), have never been designated nor referred to as "service establishments." By no reasonable construction could the employees of common carriers, public or semi-public utilities, newspapers, navigation companies, farming or fishing industries be referred to as employees of "service establishments."

If it is sound to reason that the term "service establishment" cannot be given its usual and rational meaning because the specific exemptions in Section 13(a)

(3) to 13(a) (11) would become superfluous—then it may be argued with equal force that the Administrator's narrow interpretation of "service establishment" as "retail service establishment" makes the addition of the words "service establishment" superfluous in Section 13(a) (2).

(5) In enacting the Fair Labor Standards Act Congress undertook to regulate the wages and hours of employees engaged in commerce or in production of goods for commerce, expressly rejecting as a criterion whether or not the business of the employer affected commerce. (*Kirschbaum v. Walling*, 315 U. S. 517). Because retail establishments were specifically exempted, there is no reason to conclude that the Act embraces the activities of employees of all wholesalers. (*Walling v. Jacksonville Paper Company*, 87 L.Ed. 393).

The clear and unambiguous language of the statute contains the broad exemption for employees of *all* retail and service establishments.

> Had the Congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose. *Lonas v. National Linen Service Corporation* 136 F. (2) 433.

(4)—JUDICIAL CONSTRUCTION

The coverage of Section 13(a) (2) has been held by many courts to apply to service establishments regardless of whether they be retail service establishments or not.[8]

[8] Hunt v. National Linen Service Corporation, 157 S. W. (2) 608; Beatty v. Foutz Tool Company, 5 Wage and Hour Re-

The Supreme Court of Tennessee in *Hunt v. National Linen Service Corporation*, 157 S.W. (2) 608 upon an identical state of facts as in the instant case, held that respondent was exempt under Section 13(a)(2). The theory of the plaintiff's cause in that case was precisely the same as petitioner's contention in this case. The Court disposed of the plaintiff's contention, as follows:

> We do not consider either the fact that * * * most of defendant's customers are industrial or commercial business firms as distinguished from private families as of controlling importance. This appears to have been given some significance through certain bulletins released by the Wage and Hour Division * * * It is, therefore, our conclusion that the declaration shows on its face that the defendant is engaged in operating a service establishment, the greater part of whose servicing is in intrastate commerce.

Petitioner buttresses her contention that respondent is not covered by the exemption of Section 13(a)(2) because of judicial construction of the terms "'retail" and "service" establishments in *Guess v. Montague*, supra, the *Kirschbaum* and *Arsenal cases, supra, Hanson v. Lagerstrom* 133 F. (2) 120; *Consolidated Timber Company v. Womack*, 132 F. (2) 101; *Walling v. American Stores, Inc.*, 133 F. (2) 840; and *Walling v. Jacksonville Paper Company, supra.*

Respondent submits that the decisions in none of

porter 259; Cyrus v. Martin-Jackson Tire Company, 5 Wage and Hour Reporter 477; Ellinger v. Goodyear Tire & Rubber Co. 40 Fed. Supp. 626; Stucker v. Roselle, 37 Fed. Supp. 864, Super-Cold Southwest Company v. McBride, 124 Fed. (2) 90; White Motor Company v. Littleton, 124 Fed (2) 92; Prescription House v. Anderson, 42 Fed. Supp. 874.

those cases was based on the theory that the term "service establishments" as used in Section 13(a) (2) is modified by the term "retail."

Guess v. Montague, supra, has already been discussed, and the question of whether the term "retail" modifies the term "service establishment" was not passed on by the court. The dicta in that case, as pointed out above, does discuss the meaning of the term "service establishment" as applied to the type of business which was under consideration in that case, but no contention was ever made in that case that it was not exempt under Section 13(a) (2) because the term "retail" modifies the term "service establishment."

The *Kirschbaum and Arsenal cases, supra,* deal with the question of whether or not maintenance employees of a building rented primarily by tenants engaged in the production of goods for commerce are themselves engaged in the production of goods for commerce, and, thus, not subject to the exemption of Section 13(a) (2). Neither of those cases are authority for the proposition that under that Section only retail service establishments are exempt. The question of whether the employers were conducting a service establishment is disposed of in the last paragraph of the opinion by this court in the Kirschbaum case, as follows:

> The petitioner's buildings cannot be regarded as a service establishment within the exemption of Section 13(a) (2), 29 U.S.C.A. ¶213(a). Selling space in a loft building is not equivalent to selling services to consumers, and in any event the greater part of the servicing done by the petitioner here is not in intrastate commerce.

In *Walling v. Jacksonville Paper Company, supra,* this court stated:

> Here, as in other situations (Kirschbaum and Arsenal cases) the question of the Act's coverage depends upon the special facts pertaining to the particular business.

We have discussed this case previously, and merely point out that in that case the defendant was certainly not a service establishment, and, hence, the decision could not be based on an interpretation of the term "service establishment" as used in Section 13(a) (2).

Hanson v. Lagerstrom, supra, holds that a cook preparing meals for lumbermen in an isolated lumber camp who cut and ship lumber in interstate commerce, performs so necessary a service in the production of goods for commerce that he himself was engaged in the production of goods for commerce.

To the same effect is the holding in *Consolidated Timber Company v. Womack, supra.*

In *Walling v. American Stores, Inc., supra,* the question before the court was whether or not a multi-chain store organization, operating eleven warehouses in five states and the District of Columbia, seven bakeries in three states, two canneries in Maryland, purchasing offices in New York, a coffee roasting plant, an automobile maintenance plant, a mechanical shop and laundry and garment shop, a printing and multigraphing shop, a laboratory and bottling works, a large food processing and manufacturing plant, all of the latter being in Philadelphia, was to be considered in its entirety as a retail establishment and thus exempt under Section 13(a)(2). The court properly held that an organization such as the one described above was not a retail establishment and its employees in the warehouses were engaged under the specific facts of that case in commerce within the meaning of the Act, but the ques-

tion of whether the term "retail" modified the term "service" establishment was never passed on in that case nor was it even up for consideration because the defendant in that case was clearly not a service establishment.

(d)—RESPONDENT'S ESTABLISHMENT IS A RETAIL ESTABLISHMENT

Regardless, however, of whether Section 13(a) (2) of the Act applies only to retail service establishments or not, respondent submits that it is nevertheless covered by the exemption of that Section since the complaint of the petitioner shows on its face that respondent's Knoxville branch is in fact a *retail service* establishment.

A retail establishment is one where a consumer buys for immediate or future use or consumption. A retail sale, if of a precious stone, may be of a small unit but of a larger price per unit; if of sugar, a larger quantity but of a much smaller unit price. A retail establishment may be a department store with an annual volume of millions of dollars, selling to hundreds of thousands of persons, or it may be the corner grocery store with an annual volume of less than $12,000.00 and with a smaller number of consumers.

The complaint describes respondent's business at its Knoxville Branch as the laundering, leasing and renting the use of linen supplies (such as nurses uniforms, hospital linens) to its customers who may be doctors, attorneys, restaurants, hotels, butcher shops, grocery stores, or railroads, and bus lines. The service which it renders to its customers is a service which these customers consume. None of its customers resell the use of the table cloth, apron, uniform, or any other of the articles furnished by the respondent. When the attor-

ney uses the towel supplied to him, when the butcher uses the apron, when the waitress or nurse uses the uniform, the restaurant the table cloth, the hotel the bed linen, the railroad company the towels in its rest-rooms—all this being the service supplied by the respondent's Knoxville Branch—this service is consumed and the consumers of the service are the customers of respondent's Knoxville Branch.

To contend that there is a distinction between the individual consumer such as the housewife and the commercial consumer such as the hotel or restaurant, and that in the latter case it is guests of the establishment rather than the establishment itself that is the real consumer of the service, is to overlook the fact that the hotel or restaurant guest does not purchase the use of clean linens as such. Clean linens are supplied to him as an incidental service with his real purchase, to-wit: the use of the room or the food. It becomes even clearer that a housewife, who purchases groceries or meats from the grocer or butcher is not purchasing the use of the clean linens supplied to that merchant by the linen supply company. In all of these examples the last person to pay for the use of clean linens, to-wit: the hotel establishment, the restauranteur, the butcher or the grocer, is the economic consumer of the use of these linens, just as the last purchaser of family groceries is the economic consumer thereof, though the groceries may be finally consumed by the members of purchasers' family and their guests.

This argument is amply supported by judicial decisions.[9]

[9] White Motor Company v. Littleton, 124 Fed. (2) 92.
Prescription House v. Anderson, 42 Fed. Supp 874 (drugs and hospital supplies and equipment were sold to physicians and to hospitals).

(B)—PETITIONER NOT ENGAGED IN COMMERCE OR PRODUCTION OF GOODS FOR COMMERCE.

(a)—COMPLAINT MUST AFFIRMATIVELY ESTABLISH COVERAGE OF PETITIONER

We have shown that none of the grounds advanced by petitioner in her petition for a writ of certiorari is valid, because the complaint shows on its face that respondent is exempt under Section 13(a) (2) as a service and retail establishment, the greater part of whose servicing and selling is in intrastate commerce; the language of that Section is clear and requires no judicial construction, and there is no conflict between the decisions of the Sixth Circuit Court of Appeals in the case at bar and the decisions of the Supreme Court of the United States or other Circuit Courts.

Regardless, however, of the exemptibility of respondent under Section 13(a) (2) of the Act, the complaint of petitioner is subject to dismissal on proper motion because the coverage of the Act depends not upon the

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Sybert v. Bradley, 5 CCH Labor Cases ¶60769 (sales of gasoline pumps, service station equipment and supplies and servicing of such equipment).

Great Atlantic & Pacific Company v. Cream of Wheat Company, 227 Fed. 46.

Suabedissen-Whittney Dairy v. Department of Treasury of Indiana, 16 N. E. (2) 964.

Owen v. Gifford Hill Pipe Company, USDC ND of Texas 4 CCH Labor Cases ¶70735.

Ellinger v. Goodyear Tire Company, USDC ND Ia. 1941, 40 Fed. Supp. 626 (a gasoline station sold tires, tubes, batteries, gasoline and accessories and rendered service to automobiles and trucks, in interstate commerce).

Warren v. Fink, 72 Pac. (2) 968 (merchant purchasing twine, bags and electric power for use in his business is a consumer of these items and a sale of these items to him is a retail sale).

business in which the employer is engaged but upon whether the employee is himself engaged in interstate commerce or in the production of goods for interstate commerce, *Walling v. Kirschbaum, supra; McLeod v. Threlkeld, supra; Warren-Bradshaw Drilling Company v. Hall, supra,* and the complaint discloses that the petitioning employees were neither engaged in commerce nor in the production of goods for commerce.

Under principles long settled by the Supreme Court of the United States and under the Rules of Civil Procedure it was incumbent upon petitioner to affirmatively plead facts bringing her occupational activities within the provisions of the Fair Labor Standards Act.

The rule is very well established that the plaintiff must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to Federal jurisdiction. *Norton v. Larney,* 266 U. S. 511, 45 S. Ct. 145, 69 L. Ed. 413; *Smith v. McCullough,* 270 U. S. 456, 46 S. Ct. 338, 339, 70 L. Ed. 682. The rule, as announced by the Supreme Court in these cases, is stated as follows:

> The established rule is that a plaintiff, suing in a Federal Court, must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to Federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case unless the defect be corrected by amendment.—*Gates v. Graham Ice Cream Co.,* 31 F. Supp. 854, at p. 856.

The application of the Act depends upon the character of the employees' activities. *Kirschbaum v. Wal-*

ling, supra, the burden was, therefore upon, respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce.—*Warren-Bradshaw Drilling Co. v. Hall, supra.*

(b)—STATEMENT OF PERTINENT FACTS

Insofar as is pertinent to this question, the essential allegations of the complaint may be stated, as follows:

1. That respondent's principal office is located at Atlanta, Georgia, at which place respondent is engaged in the business of manufacturing or buying such goods as linens, soap, towels, cabinets and brushes for commercial purposes, and that, after the completion of the manufacture or purchase of the goods, such goods are transported from the plant in Atlanta, Georgia, by interstate commerce to its various branch establishments located in other states, the one in question being in Knoxville, Tennessee (R 2).

2. That respondent's local branch located in Knoxville, Tennessee, operates under the tradename of "Southern Linen Service," and "engages in the business of leasing or renting the use of said linens, other toilet supplies, and cleaning properties to its said customers * * * (The respondent) agrees to and does keep its said customers furnished, from its various branch offices located in states other than the State of Georgia, with clean linens, which makes it necessary for the (respondent) at all of its branch offices to maintain a plant for the purpose of cleaning, washing, and ironing its said linens, which makes it necessary for it to

employ washers, ironers, etc., and agents to visit the various offices or places of business of its said customers daily or weekly to pick up the soiled linens and leave in their place clean linens" (R. 2, 3).

No goods are produced, manufactured, or purchased in the Knoxville establishment. Its sole activity is the leasing or renting of linens and other toilet supplies to its customers. When clean linens are delivered, soiled linens are picked up and brought to the Knoxville plant. In order to wash the soiled linens so that they may subsequently be leased or rented out, respondent maintains a laundry plant at each branch estblishment where it employs washers and ironers who launder the soiled linens.

3. Petitioner and the two employees named in the complaint, as amended, worked *exclusively* in the laundry plant in the Knoxville establishment.

Fannie L. Lonas (petitioner) described her duties as:

* * * shaking wrinkles out of starched products for the operator of the mangle, an ironing machine, operating the mangle, folding the products coming from the mangle, and packing, wrapping, and tying the products in bundles for delivery, * * * (R. 7).

The duties of Ella Scott were:
* * * folding the products coming from the mangle (R. 8).

The work performed by Mamie Scott was:
* * * shaking wrinkles out of starched products for the operator of the mangle, folding the products coming from the mangle, and packing, wrap-

ping and tying the products in bundles for delivery * * * (R. 8).

It will be noted that these employees did not handle the linens until after they had been washed and starched. They shook the wrinkles out of the starched linens, ran them through the ironing machine, folded them and packed, wrapped and tied the linens in bundles.

None of these employees handled or in any other manner worked on the goods during the process of production or manufacture. The goods were produced or manufactured at the company's plant at Atlanta, Georgia. They were then sent and received into the Knoxville, Tennessee, establishment and subsequently were rented out to customers who used them until they became soiled. Then they were returned to the Knoxville establishment, delivered to its laundry plant, and were washed and starched before they were ever touched by the complaining employees.

(c)—PETITIONER NOT ENGAGED IN COMMERCE.

Manifestly, the activities of these employees in shaking out the starched linens, ironing them and packing, wrapping and tying them in bundles had no remote connection with the manufacture or production of the linens, and such work could not possibly be deemed an occupation necessary to the production thereof as it was subsequent in time not only to the completed producing process, but also subsequent to the actual use thereof and even after its return to the branch establishment.

It is clear from the complaint, as amended, that the complaining employees performed no work incident to or connected with the transportation of the laun-

dered linens in commerce. Their last act consisted in packing, wrapping and tying the bundles. They participated in no step incident to transporation.

Before the complaining employees may be said to have been engaged in commerce it must appear that their occupational activities bore such a close or intimate relationship to commerce as to be an essential part thereof. There is nothing in the language of the Act or in its underlying purpose to indicate that Congress intended to regulate purely local activities such as the washing, ironing, folding and packing of linens while at rest in a localized laundry.

An activity that merely *affects* interstate commerce is not sufficient to bring an employee within the coverage of the Act; *Kirschbaum v. Walling, supra; McLeod v. Threlkeld, supra; Walling v. Jacksonville Paper Company, supra;* and if the cook in the case of *McLeod v. Threlkeld, supra,* who furnished the food to employees engaged in interstate commerce, was not himself so engaged, surely, petitioner in the case is similarly not engaged in interstate commerce.

In *Hunt v. National Linen Service Corporation,* 157 S. W. (2) 608, respondent was sued in the State Court upon facts identical with those set out in the complaint of petitioner. The court held:

> In our opinion the declaration shows on its face that defendant is a service establishment * * * The defendant is obviously not engaged, primarily at least, in the production of goods for commerce * * * We concede that service establishments, such as garages, could form an integral part of a business engaged in commerce or in the production of goods for commerce. Also that in certain instances such service establishments,

which are engaged mainly in servicing firms which are themselves engaged in commerce or in the production of goods for commerce, might be held subject to the Act. However, we fail to see the logic that would make the service of supplying linens a necessary or integral part of an interstate business.

(d)—PETITIONER NOT ENGAGED IN PRODUCTION OF GOODS FOR COMMERCE.

Neither can petitioner be said to be engaged in the production of goods for commerce in view of the definition of that phrase found in Section 203(j) of the Act, as follows:

> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State. 29 U.S.C.A., Fair Labor Standards Act, Sec. 203.

It is true, of course, that the amended complaint shows that the employees "handled" the goods, since they could not iron them without handling them. *But this "handling" was not incident to, a part of, or in connection with the process of the production or manufacture of the linens.* Under the language of the statute the mere handling of the goods would have no legal significance unless they were being handled in connection with production or manufacture. There is no claim in the amended complaint that the employees

were engaged in an occupation necessary to production and, on the other hand, the affirmative averments of the work done by these employees disclose that their activities had no connection whatever with the manufacture or production of the linens. They were produced and manufactured in respondent's plant in Atlanta, Georgia, and were never touched or handled by the complaining employees until long after the completion of the process of manufacture or production.

> We cannot, in construing the word "necessary," escape an inquiry into the relationship of the particular employees to the production of goods for commerce.—*Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1054, at p. 1059.

Paraphrasing the above language we cannot in construing the word "handling" escape an inquiry into the relationship of the particular employees to the production of goods for commerce.

The goods in the case at bar *had already been produced* before they ever reached the Knoxville branch of respondent, and, clearly, one cannot aid in the production of goods for commerce when the goods are already in existence and are no longer being produced. Surely, petitioner does not attempt to claim that every time a towel is being laundered, pressed, and folded it is being produced all over again within the meaning of Section 203(j) of the Fair Labor Standards Act.

We furthermore point out that there is no allegation in the petition that any of the customers of respondent are engaged in the production of goods for commerce so that it cannot be assumed that the employees are themselves engaged in the production of goods for commerce because they are a necessary link in the chain of

production of goods for commerce, which is the theory upon which the employees in *Warren-Bradshaw Drilling Co. v. Hall, supra,* and *Kirschbaum v. Walling,* supra, were held to be engaged in the production of goods for commerce.

In *Castaing, et al v. Puerto Rican American Sugar Refinery,* Inc., USDC for Puerto Rica, 7 Labor Cases, (CCH) 65,142, the court granted a motion to dismiss a petition which alleged that the plaintiff was a laundress employed by a sugar refinery, producing goods for commerce, to wash, iron, clean, prepare, and deliver caps, towels, and aprons worn and used by fellow employees while engaged in the production of goods for commerce, on the ground that such laundress was not herself engaged in the production of goods for commerce. The application of that case to the case at bar is so forceful that it does not need any further elaboration.

In its final analysis the occupational activities of the complaining employees were limited to laundering of a localized nature and indeed to the performance of only one phase of the laundering process. The linens were not being laundered in connection with the process of production and consequently they were not being handled or in any manner worked upon as a part of the process of production. The words "handled or in any other manner worked on," under the doctrine of *noscitur a sociis,* must be construed in their context and their meaning must be gathered from the language of the entire provision. Manifestly, it was not the intent of the statute, as gathered from its general purposes or its language, to include every person within the statute who "handled" goods that afterwards found their way into the stream of commerce. Such an interpretation would give the Act universal application

rather than the restricted application already marked out for it by the Supreme Court of the United States

(e)—PETITIONER NOT SUBSTANTIALLY ENGAGED IN COMMERCE OF PRODUCTION OF GOODS FOR COMMERCE

Respondent respectfully submits moreover that the complaint shows on its face that petitioner is not engaged in commerce nor in the production of goods for commerce for another reason: The complaint (R. 7, 8) alleges that petitioner worked "at least one to two hours per day each week on products transported by (respondent's) trucks from and to points in Kentucky and Virginia. The balance of the time on products transported by (respondent's) trucks from and to points in Tennessee." The total number of hours worked by petitioner are alleged to be 60 hours every week so that even if she worked two hours per day six days per week (the maximum assumption that can be made under the allegations of the complaint) she only worked 12 hours per week or 20% of her time on goods which went into interstate commerce. The rest of the time, the complaint alleges, was spent by petitioner on goods furnished to customers of respondent in the State of Tennessee, *none of whom are alleged to be producing goods for commerce.*

In order for an employee to be covered by the Act as one engaged in interstate commerce or in the production of goods for commerce, a *substantial* part of such employee's activities must relate to goods which move in the channels of interstate commerce.

> If a *substantial* part of an employee's activities relate to goods whose movement in the channels of interstate commerce was established by the

> test we have described, he is covered by the Act. (Italics ours). *Walling v. Jacksonville Paper Company, supra.*

In *Ouendag v. Gibson*, 49 F. Supp. 379, the Court states:

> Unless a *substantial* part of an employee's activities related to goods whose movement in the channels of interstate commerce is affected, he is not covered by the Act. (Italics ours).

In determining what is a substantial part of an employee's activities, the court in *Petway v. Dobson*, 43 F. Supp. 277, states:

> That where an individual is performing work immediately incidental to the making of retail sales, the greater part of which were in intrastate commerce, such as the wrapping of packages for customers, weighing out seeds in small lots, delivering bundles to customers' automobiles and other services relative to the retail part of defendant's business he is exempt from the act as being engaged in a bona fide local retailing capacity; and it is immaterial that a small part of the employee's time, not exceeding 20% of the total hours worked in a workweek, was spent in performing duties of an interstate character, such as the sweeping out of the office where interstate business was carried on and unloading cars.

Twenty per cent of an employee's time spent in interstate business is thus held not to be a *substantial* part, but a *small* part of his time, which does not result in bringing the employee within the coverage of the Act.

Under the decisions in the above cases as well as in *Hunt v. National Linen Service Corporation*, 157 S.W.

(2) 608, and *Johnson v. Dallas Downtown Development Company*, 132 F. (2) 287, the petitioner and those for whom she sues are not *substantially* engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act.

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied, because:

(a) Section 13(a) (2) of the Fair Labor Standards Act of 1938, in clear language, exempts *all* employees of retail or service establishments, the greater part of whose selling or servicing is in intrastate commerce;

(b) Respondent is not only a service establishment, but because it serves consumers, is a retail service establishment;

(c) There is no conflict between the decisions of the Court of Appeals of the Sixth Circuit and the decisions of other Circuit Courts cited by petitioner;

(d) There is no probable conflict between the decisions of the lower court in the case at bar and the decisions of this Court in the cases cited by petitioner;

(e) The petition shows on its face that petitioner is not engaged in commerce or in the production of goods for commerce within the meaning of the Act.

Respectfully submitted

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Attorneys for Respondent.

Atlanta, Georgia,
October 15, 1943.

(20)

No. 367.

OCT 19 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FANNIE L. LONAS, *Petitioner*

v.

NATIONAL LINEN SERVICE CORPORATION, *Respondent.*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE LINEN SUPPLY ASSOCIATION OF AMERICA, INC., AS AMICUS CURIAE, IN OPPOSITION.

STANLEY I. POSNER,
HENRY J. FOX,
Counsel for Amicus Curiae.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

CITATIONS.

CASES:

FEDERAL STATUTES:

MISCELLANEOUS:

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BRIEF FOR THE LINEN SUPPLY ASSOCIATION OF AMERICA, INC., AS AMICUS CURIAE, IN OPPOSITION.

PRELIMINARY STATEMENT.

The Linen Supply Association of America, Inc. is a national association of individual linen service companies. A large portion of the business of every linen service company is devoted to serving industrial and commercial cus-

tomers. The instant case is of concern to members of the Association.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 37) is reported at 136 F (2d) 433.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 22, 1943 (R. 36). The petition for a writ of certiorari was filed September 18, 1943. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Respondent is a linen service establishment whose principal customers are commercial and industrial concerns. The greater part of its business is intrastate. The question presented is whether Respondent is exempt as a "service establishment" under Section 13 (a)(2) of the Fair Labor Standards Act.

STATUTORY PROVISION INVOLVED.

Paragraph (a) of Section 13 of the Fair Labor Standards Act of 1938, hereafter referred to as the Act, (Act of June 25, 1938, 52 Stat. 1067, as amended, 29 U. S. C. Sec. 213) provides in part:

> The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employees employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

STATEMENT.

The opinion of the court below points out (R. 37) that this case presents the narrow question whether Respondent is a service establishment exempt from the requirements of the Act by Section 13 (a)(2). The brief of Amicus Curiae is directed at this sole question. In the interest of brevity, Amicus Curiae accepts the statement of the case as set forth in Respondent's brief. The pertinent facts therein clearly indicate that Respondent is a service establishment which does the greater part of its business intrastate. The principal portion of its business, however, is devoted to serving industrial and commercial customers.

ARGUMENT.

RESPONDENT'S ESTABLISHMENT IS EXEMPT FROM THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE ACT AS A SERVICE ESTABLISHMENT UNDER SECTION 13(a)(2).

Petitioner's Position.

Section 13(a)(2) of the Act exempts from the minimum wage and overtime provisions of the Act—

> any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Petitioner contends, *inter alia*, that the service establishment exemption extends only to those establishments having the characteristics of retail stores and that service establishments which sell their services principally to industrial and commercial users are not retail establishments.[1] Petitioner then concludes that Respondent is

[1] In Interpretative Bulletin No. 6, the Wage and Hour Division specifies that 75% of a laundry's business must be retail in order to qualify as a service establishment within the meaning of Section 13(a)(2). (Pet. Br. Append. par. 18, 28, 2 C. C. H. Labor Law Service, par. 32,106.)

not entitled to the exemption as a retail service establishment because sixty per cent of the customers it serves are industrial or business concerns as distinguished from private individuals. (Pet. Br. pp. 12-13.)

Position of Amicus Curiae.

Amicus Curiae submits that the court below properly held that Respondent's establishment was included within the exemption of Section 13 (a)(2) of the Act because it was a service establishment, the greater part of whose servicing was intrastate.

Scope of Term "Service Establishment."

1. *The Language of Section 13 (a)(2).* The plain language of the Act compels the conclusion that Respondent's establishment is embraced within the exemption of Section 13 (a)(2) as a service establishment, regardless of the number of commercial customers it serves. The court below describes the clear purport of the exemption as follows:

> Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intrastate commerce, and in the case of a service establishment, the greater part of its servicing must be in intrastate commerce. Had the congress intended to limit the exemption of service establishments to those which perform services for private individuals as distinguished from business enterprises, it would have had little difficulty in clearly expressing such purpose.[2] (R. 38)

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[2] Petitioner argues (Pet. Br. p. 14) that "the words 'retail' and 'service' are used conjunctively [sic] and a service establishment must be in the nature of a retail establishment." This argument is without foundation. It is obvious that the joining word in Section 13 (a) (2) is the disjunctive "or" which is normally used to indicate that only one of several requirements of a statutory provision need be fulfilled. Horack, *Cases on Legislation*, (Callaghan and Co. 1940) p. 796.

It is well settled that the words of a statute will be given their usual, ordinary, and commonly accepted meaning. *Old Colony Trust Company* v. *Commissioner*, 301 U. S. 379, 383. Congress is presumed to have used words in their natural sense. *Helvering* v. *Hutchins*, 312 U. S. 393, 396. In the light of these principles Amicus Curiae submits that the following arguments demonstrate that Respondent's establishment is the type of service establishment which Congress contemplated would be exempt under Section 13 (a) (2).

Petitioner concedes (Pet. Br. p. 8) and it is beyond question that family laundries are local services exempt under Section 13 (a) (2). Similarly, the Government's Interpretative Bulletin No. 6, upon which Petitioner relies, concedes (Pet. Br. Append. par. 18, 28) that any laundry or linen service company which does less than 25 per cent of its business with industrial or commercial customers is likewise exempt under Section 13 (a) (2). This effort, however, to create an artificial distinction between a family laundry and a commercial laundry is without substance. There is no logical distinction between them with respect to their characters as local pursuits. They are both essentially localized community services, employing the same type of persons, using the same type of equipment, performing similar functions, and, in a direct sense, competing for the same business (see *infra*, pp. 15-16). The artificial and arbitrary character of the distinction urged by Petitioner is revealed by the uniform practice of the various agencies of the Federal Government to classify family laundries, commercial laundries, and linen service companies in the same category. Following are several illustrations taken from publications of Federal agencies:

UNITED STATES DEPARTMENT OF LABOR.

(1) *The Effect of Minimum Wage Determinations in Service Industries*, Bulletin No. 166 of the Women's Bureau of the United States Department of Labor (1938).

In a chapter of this publication describing "power laundries" appears the following statement classifying all branches of this industry as "laundries":

> * * * There are differences from laundry to laundry in the proportions of the sexes employed. * * * Where damp-wash and partially-ironed service to families is an important part of the laundry's business, very few ironers are required. When linen service to hotels, apartment, restaurants, doctor's offices and office buildings is added, for each washer a number of operators on flat work ironers would be needed. (p. 263)[3]

(2) *The Woman Wage Earner—Her Situation Today*, Bulletin No. 172 of the Woman's Bureau of the United States Department of Labor (1939). This publication treats all branches of the laundry industry as a single service trade. The various factors which led Congress to exempt service establishments are recited in this Bulletin together with the following statement that the Act is not applicable to laundry services:

> State minimum-wage authorities usually have made it a policy to issue wage orders first in great intrastate industries: Retail trade, laundries, dry cleaning, and dyeing, hotels and restaurants, beauty parlors. This has been done because (1) Federal laws do not apply; * * * (p. 19).

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[3] Another Bulletin issued by the Women's Bureau entitled *Summary of Earnings and Hours in the Service Industries of Maryland, 1940*, includes a survey of 36 laundries employing 2,187 workers. No distinction is drawn between "retail" laundries and "industrial" laundries. In the card catalog of the U. S. Department of Labor Library are nearly one hundred references to the laundry trades and working conditions therein. An examination of these references revealed unanimity in description of the laundry trades as service industries. There is not a single instance of an effort to distinguish between wholesale and retail laundries.

Nowhere in this Bulletin is there a distinction drawn between laundries upon the basis of customers it serves.

UNITED STATES DEPARTMENT OF COMMERCE.

The Census of Service Establishments, 1939, 16th Census of the United States, 1940, (Monthly Employment and Sex of Employees), published by the Bureau of the Census of the United States Department of Commerce, classifies both commercial and non-commercial laundries under the same category. Table 4A on page 3 of this Census lists the following group under the heading "personal service."

Laundries, Hand .....
Laundries, power, total .....
Doing linen supply service only .....
Doing 50 per cent or more linen supply service
Doing no linen supply service .....

NATIONAL RECOVERY ADMINISTRATION.

The Code of Fair Competition for the Laundry Trade (No. 281) placed all types of laundries in a single classification.[4] At no stage in the development of the N. R. A. Laundry Code was there any suggestion that laundry services for hotels, restaurants, offices or commercial establishments be treated differently from laundry services for individual customers.

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[4] See *Industry and Business Classification*, issued in 1933 by the N. R. A. Division of Economic Research and Planning in cooperation with the Bureau of the Census, the Bureau of Labor Statistics of the U. S. Department of Labor, and the Central Statistical Board [available at United States Archives]. On page 9 appears the following classification:

040. *Laundries.* Steaming, dry cleaning, dyeing (not textile dyeing, see 081); coat or towel service (all types, hand laundry, power laundry, etc.) * * *

["Coat and towel service" is a common name for linen service companies.]

STATE MINIMUM WAGE REGULATIONS.

Further evidence that all branches of the laundry trade are considered in a single category is found in the various State minimum wage orders. In every instance the wage rates and other requirements are identical for all kinds of laundry work. The following definition of "Laundry Trade" contained in the Ohio Laundry Occupations Order (effective March 26, 1934) is typical.

> *Laundry Trade*
>
> (1) Washing, ironing, or processing incidental thereto, for compensation, of clothing, napery, blanket, bed clothing, or fabric of any kind whatsoever;
>
> (2) The collecting, sale, resale, or distribution at retail or wholesale, of laundry services;
>
> (3) The producing of laundry service for their own use by business establishments, clubs, or institutions.[5]

It is apparent from the foregoing uniform views of Federal and State Government agencies that Congress did not intend to distinguish between commercial laundries and "retail laundries." Such a distinction must be predicated upon an entirely novel concept of the classification of laundries.

Amicus curiae does not contend, as petitioner suggests (Pet. Br. pp. 9-10) that every business or industry which renders a service thereby becomes a "service establishment" within the meaning of Section 13(a)(2). Amicus curiae concedes that many establishments render services in connection with their activities, which cannot be considered "service establishments" under Section 13(a)(2). The phrase "service establishment" has a clear and unambiguous meaning in the field of labor legislation, and may, in fact, be characterized as "words of art." Encompassed

[5] Nearly identical language is contained in laundry wage orders of the following states: Connecticut, New Hampshire, Colorado, North Dakota, Oklahoma, Pennsylvania, and others.

within the phrase are laundries, restaurants, hotels, barber shops, beauty parlors, shoe repair and tailor shops, and similar local pursuits. Congress intended and should be presumed to have used the phrase in accordance with its well-established meaning. *Helvering* v. *Hutchins*, 213 U. S. 393, 396.

2. *The Intent of Congress.* As the court below pointed out Section 13 (a)(2) "is without ambiguity." (R. 39) Therefore, it is unnecessary to resort to extrinsic aids to ascertain the legislative intent of the Section. *Kuehner* v. *Irving Trust Company*, 299 U. S. 45, 49. Nevertheless, an examination of the legislative history of the Act in the light of the evil sought to be remedied[6] lends ample support to the view that Respondent's establishment is a "service establishment" within the purview of Section 13 (a)(2).

The language of Section 13 (a)(2) was born in Conference Committee after the House and Senate could not agree upon the final form of the bill. It first appeared in the confidential Conference Committee prints dated June 10, 11, and 12, 1938, respectively. The original language of the Conference Committee drafts limited the exemption to "any employee engaged in any retail establishment the greater part of whose selling is in intrastate commerce." However, the final Conference Committee Report expanded the exemption to include "any employee engaged in any retail or *service* establishment the greater part of whose selling or servicing is in intrastate commerce" (Italics Supplied) (H. Rep't 2738, 75th Cong., 3d Sess., 1938).

Petitioner ascribes (Pet. Br. pp. 13-14) significance to the fact that the language of Section 13 (a)(2) exempting "service establishments" does not appear until the final Conference Committee report. This is explained by the history of the passage of the Act. The Bill which passed the Senate (and was amended in some respects by the House) differed radically from the Bill reported by the Conference

[6] *Cf. Holy Trinity Church* v. *United States*, 143 U. S. 457, 463.

Committee which was finally enacted. The Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, did not automatically extend its wage and hour requirements to any occupation or industry. Instead, a five man Labor Standards Board was created, authorized to establish minimum wages for specific occupations upon a finding that such action would not curtail opportunities for employment.[7]

When the Conference Committee rewrote the Senate and House Bills to provide for automatic coverage of all employees "engaged in commerce or in the production of goods for commerce" it was necessary to insert a clause to exclude specifically from the operation of the Act those activities which under the previous approach could not have been designated by the proposed Labor Standards Board. To meet this necessity the language of Section 13 (a)(2) was inserted.[8]

Evidence of the general purpose of the Act to exclude local services appears in the following excerpt from Presi-

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[7] Sec. 4 (a) of S. 2475 provided:

"* * * it is declared to be the policy of this Act to maintain so far as and as rapidly as is economically feasible minimum wage and maximum hour standards at levels consistent with health, efficiency and general well being of workers and the maximum productivity and profitable operation of American business.

(b) Having regard to such policy, and upon finding after notice and hearing as hereinafter provided, that the application of the minimum wage provisions of this Act to any occupation or occupations will not curtail opportunities for employment, the Board shall by order from time to time declare, for such occupations, minimum wages which shall be as nearly adequate as is economically feasible without curtailing opportunity for employment to maintain a minimum standard of living necessary for health, efficiency and general well being. (S. 2475, as passed by the Senate July 31, 1937.)

[8] Petitioner attaches importance to the fact that the inclusion of service establishments by the Conference Committee provoked no discussion in Congress. (Pet. Br. p. 14.) The answer, of course, is that the inclusion of "service establishments" merely effectuated the general purpose of Congress. It is only natural that no discussion would be provoked concerning the inclusion of language that accomplished the purpose of Congress to exclude local pursuits.

dent Roosevelt's original message requesting Congress to enact the Act:

> Although a goodly portion of the goods of American industry moves in interstate commerce * * * there are many purely local pursuits and *services* which no Federal legislation can effectively cover. (Italics supplied)
>
> (p. 3, S. Rep't No. 884, 75th Cong. 1st Sess.)

Similarly the Report of the Senate Committee on Education and Labor manifests the underlying purpose to exclude local community enterprise from the Act. The Report[9] states:

> The bill carefully excludes from its scope business in the several states that is of a purely *local* nature. * * * *It leaves to state and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce.* For example, the policy in this regard is such that it is not even intended to include in its scope those purely local and small business establishments that happen to be near state lines and solely on account of such locations, actually serve a wholly local community within two states.[10] Italics supplied)
>
> (p. 5, S. Rept. No. 884.)

During the course of debate, Senator Black who was in charge of the bill in the Senate defined the scope of the bill in the following language:

> We eliminate in the beginning any idea that this is an effort to regulate wages and hours in the various *service employments throughout the Nation.* * * * I be-

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[9] Committee reports and explanatory statements made by the Senate and House members in charge of a bill during its passage are important aids in ascertaining the intent of Congress. *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, 474, 475; *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 463.

[10] *Cf. Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 570.

> lieve it was the prevailing * * * if not the unanimous sentiment of the committee, that *businesses of a purely local type which serve a particular local community* * * * can be better regulated by the laws of the communities and of the states * * *.[11] (Italics supplied)
>
> (Cong. Rec., Vol. 81, p. 7648, 75th Cong., 1st Sess.)

These expressions of the President, the managers of the Bill in both the House and Senate, and the Senate Committee Report clearly reflect the unequivocal purpose of Congress to avoid regulation of local service establishments in contradistinction to such non-local establishments.[12] It is apparent from the foregoing discussion (*supra* pp. 4-9) that linen service establishments have traditionally been classified with the type of local service establishments contemplated by the exemption. Petitioner,

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[11] Congresswoman Norton who was manager of the bill in the House during the course of debate reiterated the intent of Congress to avoid regulation of local business. She pointed out that:

> This bill does not attempt to put the clamp of Federal regulation on local business. Such activities remain within the protection of the several states.
>
> (Cong. Rec. Vol. 82, p. 1392, 75th Cong. 2d Sess.)

Later in the course of discussion in the House the following colloquy occurred:

> Mr. Dempsey. * * * May I ask * * * whether by the wildest stretch of imagination, or regardless of any possible administrative interpretations, this bill can in any way affect such business as that of the local groceryman, druggist, clothing store, meat dealer—any merchant, in fact—laundry, hospital, hotel, or even transportation companies operating solely within a state?
>
> "Mrs. Norton. Absolutely not.
>
> (Cong. Rec., Vol. 83, p. 7299, 75th Cong., 3d. Sess.)

[12] At the joint hearings before the Senate Committee on Education and the House Committee on Labor, Mr. Leon Henderson testified that the bill was not intended to apply to the thirteen and one-half million persons who were employed in "distribution and service." (Testimony of Leon Henderson at Joint Hearings on S. 2475 and H. R. 7200 before Senate Committee on Education and Labour and House Committee on Labor, 75th Cong. 1st Sess.)

however, seeks to frustrate this expressed purpose by narrowing the exemption of Section 13 (a)(2) to "retail" business.[13]

3. *Wage and Hour Division Interpretative Bulletin No. 6.* Petitioner argues that Interpretative Bulletin No. 6, is entitled to great weight. (Pet. Br. p. 10.) This Bulletin (Pet. Br. Append.) states, *inter alia,* that a service establishment ceases to be a service stablishment within the meaning of Section 13(a)(2) if more than 25 per cent of its service is for industrial or commercial customers. Prior to June 1941, the Wage and Hour Division promulgated the view that a service establishment lost its exemption if more than 50 per cent of its service was for industrial or commercial customers.[14]

While it is true that courts will give consideration to long-established rulings, it is equally well settled that under no circumstances are courts bound by an administrative interpretation. *United States* v. *Missouri Pacific Railway Company,* 278 U. S. 269, 280. Especially is this true where

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[13] Recently Congressman Fred A. Hartley, Jr., expressed his opinion concerning the scope of Section 13 (a) (2). Although the statement is not contemporaneous with the passage of the Act, it is entitled to great consideration. Congressman Hartley was ranking member of the House Labor Committee which handled the Act as well as a member of the Conference Committee which drafted the final language of Section 13 (a) (2). Congressman Hartley stated:

> * * *
>
> * * * there was no intention to draw a line between some of these local service establishments because of the kind of customers served. For example, laundries have always been considered service establishments. There is a definite local area served. Most laundries * * * do work for restaurants, or barber shops, or hospitals, or hotels, or stores. But they are still laundries, and as such, service establishments.
>
> (Cong. Rec. Vol. 89, p. A 1023-4, 78th Cong. 1st Sess.)

Cf. Statement of Wage-Hour Administrator, L. Metcalfe Walling, *infra,* pp. 14-15.

[14] C. C. H. Labor Law Service, par. 25,551.

the construction as in the instant case has not been uniform and consistent. *Burnet* v. *Chicago Portrait Company*, 285 U. S. 1, 16. This Court in *Neuberger* v. *Commissioner*, 311 U. S. 83, 89, pointed out that administrative rulings "cannot narrow the scope of a statute when Congress plainly has intended otherwise." See also *Fleming* v. *Belo Corporation*, 121 F. (2d) 207, 213, (C. C. A. 5) (Aff'd. 316 U. S. 624).[15]

An examination of Section 13 (a) of the Act (*supra* p. 2) shows that Congress deliberately omitted to grant the Administrator discretion to interpet the scope of the term "service establishment." It is highly significant that the Administrator is specifically authorized to define the terms appearing in Section 13 (a)(1) of the Act, but similar authority is not granted in Section 13 (a)(2). Thus it is apparent that the arbitrary and erroneous definition of "service establishment" in the Bulletin exceeds the scope of the Administrator's authority.[16]

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[15]At pages 213-214 of this case the court points out that the case of *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, which Petitioner cites (Pet. Br. p. 10), as support for his statement as to the weight of the Administrator's interpretation, is inapposite.

[16] It is important to note that the personal opinion of the present Wage and Hour Administrator, L. Metcalfe Walling, is squarely opposed to the definition of "service establishment" in Interpretative Bulletin No. 6. Following are excerpts of Mr. Walling's letters to Congressman Hartley which appeared in the Congressional Record (Vol. 89, pp. A 1024-25, 78th Cong. 1st Sess.). *Cf. Greeley* v. *Thompson*, 51 U. S. 225, 234; *Walling* v. *Belo Corporation*, 316 U. S. 624, 630.

* * *

> I am very much inclined to the view that all laundries, regardless of whether they do so-called commercial work or not, were intended by the Congress to be exempt, as you definitely state, and regardless of the outcome of the litigation I am inclined at the present time to think that our interpretation should be revised in this regard. * * * (Letter of July 2, 1942)

* * *

> As my letter of July 2, 1942, indicated, I have personally felt very strongly that the word "service" as used in sec-

4. *Practical Considerations.* Persuasive practical factors also support the conclusion that Respondent is exempt as a service establishment. The same fundamental attributes which characterize retail laundries as local service establishments are present in the case of Respondent. Both are primarily local community services. A linen service company, like a retail establishment, does not, in general compete with similar establishments in other communities and other States. It does not use the channels and instrumentalities of commerce to spread "undesirable labor conditions among the workers of the several States" which the policy section of the Act (Section 2(a)) declares is one of the evils sought to be remedied. If the wages are low or the hours long in the case of a local service establishment the condition is localized in the community. If the wages and hours prevailing in a local service establishment in a neighboring state or community are good, they are not threatened by the competition of a low wage community because intrinsically the area of competition is circumscribed.

The distinction between commercial and retail laundries in Interpretative Bulletin No. 6 is also illogical and unjust in its application. There are some so-called "retail laundries" of great size which do family laundry work primarily. However, under the Bulletin they are permitted to do up to 25 per cent of their total business with commercial customers before they lose their exemption under Section 13(a)(2). It is obvious that they are permitted to do

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tion 13 (a) (2) of the Fair Labor Standards Act is not limited by the term "retail" appearing in the same section.

* * *

These facts have been put before the circuit court of appeals in the case of *Lonas* v. *National Linen Service Corporation* for the purpose of clarification, and it is for this reason principally that the brief has been filed. I shall be inclined to an immediate clarification of interpretative bulletin No. 6, including the interpretation of the term "service establishments" if the circuit court of appeals sustains the district court in this matter. * * * (Letter of February 22, 1943)

a vastly greater volume of commercial work without exceeding the 25 per cent limitation than a small linen service company all of whose customers are commercial. It is clear that Congress did not intend such an unfair competitive result. In *Walling* v. *Jacksonville Paper Company*, 317 U. S. 564, 570, the Government argued that the appellee who was doing a local wholesale business should be covered by the Act because otherwise its interstate competitors would be at a competitive disadvantage. In the instant case, where the situation is reversed, the same logic applies.

CONCLUSION.

The decision below is correct, and no conflict of decisions or any question of general importance is presented. Amicus Curiae, therefore, respectfully submits that the petition for a writ of certiorari should be denied.

LINEN SUPPLY ASSOCIATION OF AMERICA, INC.
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